STATE OF VERMONT

HUMAN SERVICES BOARD

In re	)	Fair Hearing No. 19,946
	)	
Appeal of	)	

INTRODUCTION

The administrator of the petitioner's estate[1] appeals a decision of the Department for Children and Families (DCF) finding the petitioner ineligible for long term care Medicaid benefits based on excess resources.

FINDINGS OF FACT

The following proposed facts are based on stipulations which the parties agreed to at a hearing held on October 13, 2005 and copies of documents submitted by the petitioner at the hearing and on November 2, 2005 and by DCF on October 25,

[1] As this recommendation was being prepared, DCF raised the issue of whether the attorney in this case actually represents the decedent's estate. It is assumed herein that he does although as DCF has raised this issue, the attorney should be prepared to show that he does represent the estate at the Board meeting on December 7. It is only an administrator of an estate who can pursue an eligibility appeal. See M104.

2005.[2] Neither the petitioner nor DCF objected to the submission of the documents received post-hearing.

1. The decedent was ninety years old when he applied for Medicaid on April 29, 2005 to cover the costs of his long-term care in a nursing facility where he had been a private pay patient since December of 2004. The decedent's son, J.R., filed the application for him under a general power of attorney to conduct virtually all his business which the decedent had granted him on August 12, 1992. The decedent died on June 22, 2005 before DCF made a decision on his eligibility. His estate continued to pursue his Medicaid eligibility for a three month period from April through June of 2005.

2. On September 9, 2005, DCF denied the decedent's application for having resources which were $59,173.71 in excess of the $2,000 maximum. The resources included a savings account and cash resources totaling $1,822, a $3,400 bank account representing the remainder of an escrow account established on March 15, 2005 for the painting of the

[2] These documents consisted of application materials, DCF notices of decision, DCF requests for information and verification of income and resources and the petitioner's responses thereto, as well as copies of tax filings, bank accounts and life insurance statements, health insurance card, cancelled checks, invoices, power of attorney grants and real estate deeds.

decedent's home and a life estate valued at $55,951.71.[3] The petitioner/estate appealed this decision on September 19, 2005.

3. The only resources which would potentially disqualify the petitioner/estate from establishing eligibility are the escrow account and the life estate. DCF indicated at hearing that the escrow account was not the focus of the disqualification and that the life estate was the impediment to eligibility. However, in its memoranda filed subsequent to hearing it argued that both accounts are disqualifying. The petitioner responded to arguments regarding both assets.

4. The first asset at issue, the escrow account, was created when the decedent placed $25,900 in an account labeled "house account" on March 14, 2005 on which both he and his son, J.R., as power of attorney were listed as owners and the petitioner's two sons as beneficiaries. The account was set up to pay the cost of painting the decedent's house and barn and required two signatures to withdraw any funds from the account.

[3] DCF excluded $10,000 in a burial account, the value of a life estate and power of sale in his own home which he retained after the remainder was conveyed to his son in March of 2005 and a life insurance policy worth $1,000.

5. The estimate for the cost of the painting and agreement to pay were done verbally. $7,500 was paid out on that account for “prep work” on March 31, 2005, $7,500 for painting on April 19, 2005, $7,500 on May 8, 2005 and April 26, 2005. Each check was made out to the painting business and contained the signatures of both J.R., as power of attorney for the decedent, and the painter who owned the business. An invoice was submitted on May 31, 2005 showing that the work on the house had been 90 percent completed and that the barn was 70 percent complete. The invoice showed that $22,500 had been received so far in payment. The invoice stated that $3,400 was due under the contract. Because DCF wanted to see a written estimate of the cost of the work and the decedent had not previously gotten one, the painter prepared a written estimate on May 31, 2005 showing that the entire job was expected to cost $25,900.

6. The second asset at issue was a life estate purchased by the decedent for $49,000 on April 15, 2005. The life estate was an interest in property which had been wholly owned by the decedent’s son, J.R., and his spouse. In the quitclaim deed which created the life estate, J.R. and his spouse gave the decedent an exclusive right to use their property during the term of the life estate. The parties

agree that the market value of the life estate (based on the value of the property and life expectancy tables) at the time of application was $55,951.71. The parties also agree that J.R. and his spouse did not give the petitioner a right to sell his life estate in their property. The life estate has since been extinguished by the decedent's death.

ORDER

The decision of DCF finding the decedent ineligible for Medicaid due to excess resources is affirmed.

REASONS

The burden is always on an applicant for benefits to show that he meets the eligibility requirements, including the financial requirements, for long-term Medicaid. Fair Hearing Rule No. 11. As a program intended for low-income persons[4] the Medicaid regulations disqualify individuals who have countable financial resources in excess of $2,000. M220, P-2420(c). Resources are defined by the program as "available cash or other property owned by individuals and available for their support and maintenance." M230. The regulations require that "all resources of the members of the

[4] 42 U.S.C. § 1396a(a)(10)(ii)(XII) limits Medicaid to persons with income no more than 250 percent of the federal poverty line.

financial responsibility group must be counted except those specifically excluded." M230.

Ownership interests in real property, other than the applicant's personal residence, are generally included as a countable resource in determining eligibility. M 231. Some exclusions from countability are carved out of the general rule, including exclusion for certain kinds of life estates:

Life Estates

(a) Definition

Life estate means a legal arrangement entitling the owners to possess, rent, and otherwise profit from real or personal property during their lifetime. The owner of a life estate sometimes may have the right to sell the life estate but does not normally have future rights to the property. Ownership of a life estate may be conditioned upon other circumstances, such as a new spouse. The document granting the life estate includes the conditions for the life estate and the right of the owner to sell or bequeath it, if these property rights were retained.

(b) Exclusion for life estate interests created on or after July 1, 2002

When the owners retain the power to sell the entire real property, including any remainder interest, the department excludes the value of the life estate in the real property only if the life estate is an interest in the individual's home (M232.11). For this purpose, the value of the life estate includes the value of the remainder interest.

> The department excludes life estates in real property when the owner does not retain the power to sell the real property.
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> . . .
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> M232.16

The countability of the decedent's life estate hinges upon the interpretation of this regulation. Both the parties agree that life estates are countable under this regulation if the owner of the life estate has the power to sell the property. As a factual matter, both parties agree that the decedent's life estate did not include that power. The dispute between the parties arises from DCF's view of the regulation as referring only to a life estate that was created from property that was already owned by the petitioner, not a life estate that was purchased from some other property owner. The petitioner/estate does not dispute that the decedent purchased the life estate from another property owner (his son and daughter-in-law) but argues that DCF's interpretation is wrong and that the regulation also includes purchases of life estates from other property owners.

In support of its interpretation, DCF points to language in the above regulation which refers to an "owner" of property who either "retains" or does "not retain" a right to

certain interests in the real estate at issue. DCF argues that the legal meaning of the word "retain" means "to **continue** to hold, have, use recognize, etc, and **to keep**." Blacks Law Dictionary, Fifth Edition. (DCF's emphasis.) That word "retain" necessarily implies, in DCF's view, that the person with the life estate kept it from a larger interest in property he once owned. Citing language in State v. Gabriel, 192 Conn. 405 (1984), DCF argues that there is a real legal distinction between "receive" and "retain" in that one must first have acquired something before it can be retained. As the decedent never owned the property from which the life estate was granted, DCF believes he has obtained something, but retained nothing in purchasing this life estate and thus does not fall under the narrow exception in the regulation above.

The petitioner/estate argues that the definition of a life estate found under (a) does not say that a life estate only exists when it is retained. The petitioner/estate further argues that it is not the fact of the existence of a life estate which is disqualifying but it is the addition of certain powers (e.g. sale or mortgage) to a life estate that can make it countable, no matter how it was created. In support of its position, the petitioner/estate relies on a

bulletin issued by DCF which recently tightened this rule based on a legislative directive to include as disqualifying those life estates retaining the power to mortgage as well as those which retain the right to sell the property:

> Currently the department considers life estates an excluded resource if an individual retains the power to fully mortgage the property, even though the individual owns only a life estate without the power to sell the property. The power to mortgage effectively makes the full value of the asset available to the individual. The proposed rule provides that the department will count an applicant's life estate as a resource if the applicant retains the power to sell or mortgage, unless the life estate is held in the applicant's principal place of residence. This eliminates an unnecessary disregard of a private resource available to pay for care.
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> DCF Bulletin 05-19F, Page 4.

Unfortunately, the passage cited above by the petitioner/estate in no way addresses the issue before the Board: whether the life estate to be excluded must have been created from property owned by the applicant. If anything, the section cited by the petitioner/estate supports DCF's view that the estate must be "retained" as that language is again used by DCF. Section (a) of the regulation cited above is of no help either since it only seeks to explain what a "life estate" is and describe some of its varieties, not to say which of these kinds of life estates might be excludible.

The decisional factor in this case hinges on the words used in the regulation above at section (b) which does address which life estates are to be excluded. Statutory (or regulatory, in this case) interpretation always begins with a close look at the language used in the regulation itself. State v. Pratt, 173 Vt 562, 795 A.2d 1148 (2002). Since the first part of (b) applies to a life estate which is created from the applicant's personal residence, it is the second one-sentence paragraph of the regulation that is applicable here: "The department excludes life estates in real property when the owner does not retain the power to sell the real property."

In interpreting this sentence, every word is to be given its ordinary meaning and no word is to be interpreted as unintended surplusage. See Fletcher Hills, Inc. v. Crosbie, 2005 Vt. 1, 872 A.2d 292 (2005). DCF is correct that the ordinary meaning of the word "retain" is to keep something. DCF is also correct that one cannot keep an interest in a piece of property which was not previously owned. If DCF had intended to include every life estate, even those created by purchase from other property owners, it could have used a word like obtained, rather than retained. However, DCF did not use that word and it must be concluded that DCF used the

word "retained" with intent, and not through some kind of error or sloppiness.

Since the petitioner/estate brought up the fact that DCF has a new bulletin implementing a recent further restriction on estates, it is interesting to note that the word used by the legislature itself in directing this new restriction is "reserved", a word similar to "retained". In that new statute, the legislature directed DCF to amend the Medicaid Rules on July 1, 2005[5] under an expedited process in order:

> (5) To count as a resource a life estate held by the applicant or recipient with a **reserved** power-to-mortgage (other than the principal place of residence) and value the life estate at the full fair market value of the fee estate, notwithstanding the purported creation of a remainder interest in another party.
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> § 303 Long-Term Care Financial Eligibility 2005, Appropriations Act 71 (H. 516)

The sole purpose of this statutory change is to exclude not only life estates that include a power of sale but also those that include a power to mortgage.[6] The language in the new statue again uses a version of "retain" (reserved) to describe the life estate interest. The legislature could

[5] This is the regulation referred to in DCF's bulletin 05-19F which was relied on by the petitioner and quoted above.

[6] Of course, as this statue went into effect more than two months after the petitioner's application, it is in no way applicable to determining his eligibility. It is only instructive as a continued expression of legislative intent.

have used language which clearly included other life estates but it did not. Its choice of this restrictive word further supports DCF's contention that its regulation was meant to apply only to property previously owned by the petitioner. Furthermore, the legislature's continued use of such language gives additional weight to a finding that DCF's interpretation of its regulation implements the intent of the legislature, a goal which is the ultimate objective of any attempt to interpret a regulation. Hartford Board of Library Trustees v. Town of Hartford, 174 VT 598, 816 A.2d 512 (2002).

The petitioner/estate may be correct that the legislature or DCF could have made it more obvious that life estates must be created only from property owned by the applicant. However, the petitioner/estate has a heavy burden when it comes to arguing against DCF's reasonable interpretation of the language it used in its regulation. This is true first because the petitioner/estate has the general burden of proof in this matter, which requires it to show that DCF's interpretation of its own regulation is not supported by the plain language of the regulation or is unreasonable in light of the statutory purpose. The petitioner/estate has failed on this first count because it

has shown no support for its position in the actual language of the regulation unless the word "retained" is completely ignored. On the second count, the petitioner/estate has offered no argument that counting the purchased life estate is inconsistent with the Medicaid statutory scheme which generally requires persons to use their resources to pay their medical bills, and eschews voluntary impoverishment.

The second reason that the petitioner's burden is particularly heavy in this matter is that statutes (and regulations) are generally construed strictly against persons who are seeking exceptions to a general rule. See Our Lady of Ephesus House of Prayer, Inc. v. Town of Jamaica, 2005 Docket, Vt. 16, 869 A.2d 145 (2005)(a claim of exemption form paying taxes) and In re Appeal of Casella Waste Management, 175 Vt. 335, 830 A.2d 60 (2003)(a claim of exemption from a zoning ordinance). In this case the general rule is that real property resources that do not consist of a personal residence are countable resources available to pay necessary medical expenses. M230. Certain specific exceptions are carved out to the general rule in the regulations. It is the duty of the interpreting authority not to expand these exceptions through an additive reading of the regulations. DCF's regulation must be read strictly as written against the

petitioner/estate because it is an exception to the general rule. A strict reading of this rule excludes life estates which are not retained from property owned by the applicant himself. DCF and the Board have no authority to imply an exclusion of yet another class of property in the absence of any clear statutory language creating that exclusion.

As the petitioner/estate has failed to meet its burden of showing that the life estate purchased by the decedent from family members two weeks before his application for Medicaid[7] is an excluded resource, it must be counted as available to meet his medical needs. Both parties have agreed that counting this $55,951.71 resource results in the decedent's financial ineligibility for the Medicaid program during the three months at issue. Therefore, the Board is bound to affirm the result in this matter because it is consistent with DCF's regulations. 3 V.S.A. § 3091(d), Fair Hearing Rule 17. Because the decedent has been found to be ineligible based on the countability of the value of the life estate alone, it is not necessary to determine whether the much smaller escrow account is also a countable resource.

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[7] DCF does note that the petitioner was given an exemption for the life estate created from his own previously owned property.